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Peguam Negara Malaysia v Chan Tsu Chong & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-01(A)-198–06 OF 2017
UMI KALTHUM, IDRUS HARUN AND HASNAH HASHIM JJCA
28 NOVEMBER 2017

C *Administrative Law — Judicial review — Election — Revision of proposed recommendations — Objections of proposed recommendations by registered electors — Whether Election Commission's proposed recommendation subject to judicial review — Whether electoral roll used in review exercise — Whether electoral roll used in review exercise could be questioned on ground that electors* D *purportedly have no addresses corresponding to their names — Federal Constitution*

In accordance with art 113(2) of the Federal Constitution ('the FC'), the Election Commission ('the first respondent') was tasked to review the division E of the States of Malaya into federal and state constituencies. The first respondent then published a notice under s 4 of the Thirteenth Schedule to the FC ('the first notice') and invited representations and/or objections in relation to the proposed recommendations. Following the submission and receipt of the representations and/or objections, local enquiries were conducted. After a F revision, the first respondent proposed recommendations and published another notice ('the second notice') under s 7 of the Thirteenth Schedule of the FC. The registered electors ('the applicants') filed objections against the proposed recommendations and further applied for leave to commence judicial review proceedings at the High Court. The applicants also sought a stay of any G local until the final disposal of the application for judicial review. According to the applicants, in conducting the delimitation exercise, the first respondent contravened the constitutional principles in the FC. However, the first respondent proceeded to file a notice of the proposed recommendation. At the High Court, the applicants argued that the first respondent's non-compliance H with s 2(c) and (d) of the Thirteenth Schedule would have the effect of nullifying the proposed recommendations. The High Court judge held that the first respondent's action was amenable to judicial review and granted leave. Hence, the present appeal by the attorney general. The issues that arose were: (i) whether the first respondent's proposed recommendation was subject to I judicial review; (ii) whether the current electoral roll, as required by s 3 of the Thirteenth Schedule, was used in the review exercise; (iii) whether the electoral roll used in the review exercise could be questioned on the ground that 44,190 electors purportedly have no addresses corresponding to their names; and (iv) whether the second notice and the first respondent revised proposed

recommendations for excluding the State of Selangor contravened art 113(6) of the FC. A

Held, allowing appeal:

(1) A judicial review by the courts in matters pertaining to the delimitation exercise would be an encroachment of a function constitutionally mandated by the Federal Constitution. The delimitation exercise was a process which will be ultimately decided by the House of Representatives. Article 113 to the FC entrusted it upon the first respondent to undertake the delimitation process within the framework of the said article. The first respondent's findings and proposed recommendations were not binding or have any legal effect as the proper authority for deciding on the delimitation of constituencies is the House of Representatives. The findings and recommendations of the first respondent did not come within the ambit of O 53 of the Rules of Court 2012 and the High Court judge gravely erred in granting leave (see paras 46–47). B C D

(2) When the delimitation exercise was commenced, the current electoral roll would be the 2015 Principal Electoral Roll as it was published in the *gazette* on 13 May 2016. The first notice was published on 15 September 2016. The supplementary electoral roll for the first quarter of 2016 was published in the *gazette* on 19 July 2016 after the first notice. No arguable case had been made out by the applicants for the matter to be further investigated at the substantive stage (see para 53). E F

(3) The first respondent in this delimitation exercise had used the Electoral Roll which was certified and *gazetted*. The law was explicit that once the electoral Roll had been certified and *gazetted*, it shall be deemed final and could not be questioned by any court (see para 57). G

(4) Article 113(6) to the FC envisaged that the delimitation exercise must be undertaken as a single unit of review. It was expressly defined that 'unit of review' shall mean, for federal constituencies, the area under review and, for state constituencies, the state. In this case, the first respondent had proceeded to carry out its constitutional function and issued the second notice for all affected constituencies except for the State of Selangor which could not be included because of the stay order granted by the High Court. The first respondent should not be hampered in any manner to carry out its constitutional function because of the intervening act to stay the exercise in the State of Selangor. The first respondent was constitutionally bound to proceed with all the local enquiries in order to discharge its constitutional duty (see paras 61–62). H I

[Bahasa Malaysia summary

Selaras dengan perkara 113(2) Perlembagaan Persekutuan ('PP'), Suruhanjaya Pilihanraya ('responden pertama') ditugaskan menyemak bahagian negeri-negeri Malaya kepada kawasan persekutuan dan negeri. Responden pertama kemudian menerbitkan satu notis di bawah s 4 Jadual Ketiga Belas PP ('notis pertama') dan membuka ruang pewakilan dan/atau bantahan bagi cadangan-cadangan yang dicadangkan. Berikutan pengemukaan dan penerimaan pewakilan dan/atau bantahan, inkuiri tempatan dijalankan. Selepas semakan, responden mencadangkan cadangan-cadangan dan menerbitkan satu lagi notis ('notis kedua') di bawah s 7 Jadual Ketiga Belas PP. Pengundi-pengundi berdaftar ('pemohon-pemohon') memfailkan bantahan terhadap cadangan-cadangan yang dicadangkan dan seterusnya memohon kebenaran memulakan prosiding semakan kehakiman di Mahkamah Tinggi. Pemohon-pemohon juga memohon penggantungan apa-apa inkuiri tempatan hingga pelupusan akhir permohonan semakan kehakiman. Menurut pemohon-pemohon, dalam menjalankan langkah-langkah penyempadanan, responden pertama melanggar prinsip-prinsip perlembagaan di bawah PP. Walau bagaimanapun, responden pertama meneruskan untuk memfailkan notis cadangan yang dicadangkan. Di Mahkamah Tinggi, pemohon-pemohon menghujahkan bahawa ketakpatuhan responden pertama terhadap s 2(c) dan (d) Jadual Ketiga Belas mempunyai kesan membatalkan cadangan-cadangan yang dicadangkan. Hakim Mahkamah Tinggi memutuskan bahawa tindakan responden pertama boleh dikenakan semakan kehakiman dan kebenaran diberi. Oleh itu, rayuan ini difailkan oleh peguam negara. Isu-isu yang timbul adalah: (a) sama ada cadangan-cadangan yang dicadangkan tertakluk pada semakan kehakiman; (b) sama ada daftar pemilih, seperti yang dikehendaki s 3 Jadual Ketiga Belas, digunakan dalam langkah semakan; (c) samada daftar pemilih yang digunakan dalam langkah semakan boleh dipersoal atas alasan 44,190 pengundi kononnya tidak beralamat yang sepadan dengan nama mereka; dan (d) sama ada notis kedua dan cadangan-cadangan responden pertama yang dicadangkan termasuk Negeri Selangor melanggar perkara 113(6) PP.

Diputuskan, membenarkan rayuan:

(1) Semakan kehakiman oleh mahkamah dalam hal-hal berkaitan langkah penyempadanan adalah campur tangan fungsi berperlembagaan yang dimandatkan di bawah Perlembagaan Persekutuan. Langkah penyempadanan adalah proses yang, pada akhirnya, diputuskan oleh Dewan Rakyat. Perkara 113 PP mengamanahkan responden untuk menjalankan proses penyempadanan dalam kerangka perkara tersebut. Dapatan-dapatan responden pertama dan cadangan-cadangan yang dijalankan tidak mengikat mahupun mempunyai kesan undang-undang kerana pihak berkuasa sebenar untuk memutuskan penyempadanan kawasan adalah Dewan Rakyat. Dapatan dan cadangan responden

pertama tidak timbul di bawah skop A 53 Kaedah-Kaedah Mahkamah 2012 dan hakim Mahkamah Tinggi terkhilaf besar dalam memberi kebenaran (lihat perenggan 46–47).

(2) Apabila langkah penyempadanan dimulakan, daftar pemilih semasa adalah daftar pemilih prinsipal kerana diterbitkan dalam warta pada 13 Mei 2016. Notis pertama diterbitkan pada 15 September 2016. Daftar pemilih tambahan bagi suku pertama tahun 2016 diterbitkan dalam warta pada 19 Julai selepas notis pertama. Tiada kes yang boleh dipertikaikan yang dibuktikan oleh pemohon-pemohon agar hal keadaan ini disiasat lanjut pada peringkat substantif (lihat perenggan 53).

(3) Dalam langkah penyempadanan ini, responden pertama telah mengguna pakai daftar pemilih yang disahkan dan diwartakan. Undang-undang jelas bahawa apabila daftar pemilih disahkan dan diwartakan, ia dianggap muktamad dan tidak boleh dipertikai oleh mana-mana mahkamah (lihat perenggan 57).

(4) Perkara 113(6) PP menggambarkan langkah penyempadanan mesti diambil sebagai unit tunggal semakan. Dinyatakan dengan jelas bahawa 'unit semakan' hendaklah bermaksud, bagi kawasan persekutuan, kawasan di bawah semakan dan bagi kawasan-kawasan negeri, negeri. Dalam kes ini responden pertama menjalankan fungsi perlembagaan dan mengeluarkan notis kedua bagi kesemua kawasan yang terkesan kecuali negeri Selangor yang tidak boleh disertakan akibat perintah penggantungan yang dibenarkan oleh Mahkamah Tinggi. Responden pertama tidak boleh dihalang dalam apa-apa jua cara untuk menjalankan fungsi keperlembagaannya kerana tindakan campur tangan untuk menggantung penjalanan langkah ini di Negeri Selangor. Responden pertama terikat di bawah perlembagaan untuk meneruskan dengan inkuiri tempatan untuk melepaskan tugas perlembagaannya (lihat perenggan 61–62).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 318–518.

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Ahir bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 2 CLJ 1125; [1992] 1 CLJ Rep 72, SC (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on

Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490; [2012] 1 CLJ 805, FC (refd)
Mkini Dotcom Sdn Bhd & Ors v Chief Judge of Malaya & Ors [2016] 8 MLJ 357; [2015] 9 CLJ 459, HC (refd)
Muhammad Sanusi bin Md Nor v Mohd Tajuddin bin Abdullah & Ors [2008] MLJU 570; [2009] 1 CLJ 1, FC (refd)
Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367, CA (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi [2015] MLJU 2268; [2015] 3 AMR 35, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812; [2014] 9 CLJ 577, FC (refd)
Yong Teck Lee v Harris Mohd Salleh & Ors [2002] 3 MLJ 230; [2002] 3 CLJ 422, CA (refd)

Legislation referred to

Elections Act 1958 s 9A
Federal Constitution arts 46, 113, 113(2), (2)(i), (3A), (6), (9), (10), Thirteenth Schedule, Part I, s 2, 3, Part II, ss 2(c), 2(d), 4, 5, 7, 8, 10, 11, 12
Rules of Court 2012 O 53, O 53 r 2, 2(4)

Appeal from: Application For Judicial Review No MA-25–05–04 of 2017 (High Court, Melaka)

Amarjeet Singh (Suzana bt Atan, Shamsul bin Bolhassan, Azizan bin Mohd Arshad and Nik Azrin Zairin Nik Abdullah with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Ambiga Sreenevasan (J Amardas, KP Ng, Kee Tong Kiat, Caroline Chin and Lim Wei Jiet with her) (KP NG & Amardas) for the respondents.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This is an appeal by the attorney general who appeared below against the decision of the learned High Court judge granting leave to the applicants/respondents to commence judicial review proceedings. We heard the appeal on 18 July 2017. After hearing submissions from learned counsels for the appellant and the respondents, we unanimously allowed the appeal. We now provide the detailed reasons for our decision.

[2] For convenience, in this judgment, the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] In accordance with the requirements of cl (2) of of the Federal Constitution, the Election Commission ('the first respondent') is tasked to undertake a review of the division of the States of Malaya into federal constituencies and state constituencies.

[4] The first respondent then published a notice as required by s 4 of the Thirteenth Schedule to the Federal Constitution ('the first notice') on 15 September 2016. The first respondent invited representations and/or objections in relation to the proposed recommendations. After the submission and receipt of the representations and/or objections, local enquiries as required by s 5 of the Thirteenth Schedule to the Federal Constitution were then conducted by the first respondent.

[5] On 8 March 2017, the first respondent revised the proposed recommendations after having considered the representations and/or objections made in respect of the revised proposed recommendations and published another notice ('the second notice') pursuant to s 7 of the Thirteenth Schedule of the Federal Constitution. As required by the aforesaid s 7 the first respondent invited representations and/or objections in respect of the revised proposed recommendations.

[6] The applicants are registered electors in Parliamentary and state constituencies in the State of Melaka. In his affidavit in support the first applicant stated that he was one of more than 100 electors from N20 Kota Laksamana and P138 Kota Melaka who had filed objections against the proposed recommendations. The first applicant had participated in the first enquiry pursuant to the first notice held on 29 November 2016.

[7] The applicants filed on 4 April 2017 an application for leave to commence judicial review proceedings and sought the following reliefs:

(1) Satu deklarasi bahawa Notis yang diterbitkan oleh Suruhanjaya Pilihan Raya di bawah Seksyen 7, Bahagian II, Jadual Ketiga Belas kepada Perlembagaan Persekutuan yang bertajuk 'Syor- syor Yang Dicadangkan untuk Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri dalam Negeri-negeri Tanah Melayu (Kecuali Negeri Selangor) sebagaimana yang telah Dikaji Semula oleh Suruhanjaya Pilihan Raya dalam tahun 2017' pada 08.03.2017 adalah tidak sah dan terbatal kerana tidak selaras dengan Fasal 113(6), Perlembagaan Persekutuan;

(2) Satu deklarasi bahawa Syor-syor Yang Dicadangkan untuk Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri di Negeri Melaka sebagaimana Dikaji Semula oleh Suruhanjaya Pilihan Raya pada 08.03.2017 (selepas ini dirujuk sebagai 'Syor 08.03.2017 tersebut') adalah tidak berperlembagaan kerana pembahagian Bahagian-bahagian Pilihan Raya di Melaka tidak boleh dikatakan lebih kurang sama banyak menurut Seksyen 2(c), Jadual Ketiga Belas kepada Perlembagaan Persekutuan dan oleh itu adalah tidak sah dan terbatal;

(3) Satu deklarasi bahawa Syor 08.03.2017 tersebut adalah tidak berperlembagaan kerana perhatian tidak diberikan kepada pemeliharaan hubungan tempatan mengikut Seksyen 2(d), Jadual Ketiga Belas kepada Perlembagaan Persekutuan dan oleh itu adalah tidak sah dan terbatal;

(4) Satu deklarasi bahawa daftar pemilih yang digunakan oleh Suruhanjaya Pilihan Raya dalam kajian semula persempadanan Bahagian-bahagian Pilihan Raya di Negeri-Negeri Tanah Melayu bukan daftar pemilih semasa dan adalah bercanggah dengan Seksyen 3, Bahagian 1, Jadual Ketiga Belas, Perlembagaan Persekutuan;

(5) Tertakluk kepada perenggan 4, suatu deklarasi bahawa pergantungan Suruhanjaya Pilihan Raya kepada Daftar Pemilih Induk tahun 2015 yang mengandungi maklumat yang tidak tepat dan tidak lengkap bagi Negeri Melaka dalam persempadanan Bahagian-bahagian Pilihan Raya di Negeri-negeri Tanah Melayu sebagaimana dikaji semula oleh Suruhanjaya Pilihan Raya pada 08.03.2017, menjadikan persempadanan Bahagian-bahagian Pilihan Raya di Negeri-negeri Tanah Melayu sebagaimana dikaji semula oleh Suruhanjaya Pilihan Raya pada 03.08.2017 tidak sah dan terbatal;

(6) Suatu perintah certiorari untuk membatalkan:

(a) Notis yang diterbitkan di bawah Seksyen 7, Bahagian II, Jadual Ketiga Belas kepada Perlembagaan Persekutuan yang bertajuk 'Syor-syor Yang Dicadangkan untuk Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri dalam Negeri-Negeri Tanah Melayu (Kecuali Negeri Selangor) sebagaimana Dikaji Semula oleh Suruhanjaya Pilihan Raya dalam Tahun 2017' pada 08.03.2017;

(b) Syor-syor Yang Dicadangkan untuk Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri di Negeri Melaka sebagaimana Dikaji Semula oleh Suruhanjaya Pilihan Raya pada 08.03.2017; dan

(c) Draf rancangan Bahagian-bahagian Pilihan Raya untuk negeri Melaka.

(7) Satu perintah mandamus mengarahkan Responden-responden untuk menerbitkan notis baru di bawah Seksyen 7, Bahagian II, Jadual Ketiga Belas kepada Perlembagaan Persekutuan yang termasuk negeri Selangor dan bahawa Syor-syor cadangan baru harus meliputi semua Negeri-negeri Tanah Melayu selaras dengan Fasal 113(6), Perlembagaan Persekutuan;

(8) Satu perintah mandamus mengarahkan Responden-responden untuk mematuhi Seksyen 3, Jadual Ketiga Belas kepada Perlembagaan

Persekutuan dengan menggunakan daftar pemilih semasa dalam kajian semula oleh Responden-responden untuk pembahagian Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri-negeri;

(9) Satu perintah mandamus mengarahkan Responden-responden untuk mematuhi Seksyen 2(c) dan (d), Jadual Ketiga Belas, Perlembagaan Persekutuan dalam membahagikan mana-mana unit kajian semula kepada Bahagian-bahagian Pilihan Raya dan menyiarkan syor-syor yang dicadangkan bagi Bahagian-bahagian Pilihan Raya Persekutuan dan Negeri yang selaras dengan peruntukan yang terkandung dalam Jadual Ketiga Belas, Perlembagaan Persekutuan;

(10) Kos;

(11) Kebebasan memohon (Liberty to apply); dan

(12) Mana-mana relif lain atau selanjutnya yang Mahkamah Yang Mulia ini fikirkan patut dan suaimanfaat.

[8] In the same application the applicants had also sought a stay of any local enquiry conducted by the first respondent pursuant to s 5 of the Thirteenth Schedule to the Federal Constitution until the final disposal of the application for judicial review. Briefly, the grounds in support of the application for leave were as follows:

(a) that the proposed recommendations violated ss 2(c) and 2(d) of the Thirteenth Schedule of the Federal Constitution;

(b) that the first respondent has not used the current electoral roll as required by s 3 of the Thirteenth Schedule;

(c) the electoral roll used is defective as there are no addresses corresponding to the electors' names for 44,190 electors in the State of Malacca; and

(d) that the notice dated 8 March 2017 and the proposed recommendations is unlawful for non-compliance with art 113(6) of the Federal Constitution.

[9] It is the applicants' contention that in conducting the delimitation exercise pursuant to art 113 of the Federal Constitution, the first respondent contravened the constitutional principles as embodied in the Federal Constitution.

[10] The applicants together with the 100 other individuals submitted an objection to the first proposed recommendations in relation to the malapportionment and breaking up of local ties in the parliamentary constituency of P138 Kota Melaka and state constituency of N20 Kota Laksamana.

[11] The first respondent, however, proceeded to file a notice of the proposed recommendations for federal and state constituencies pursuant to s 7 of the Thirteenth Schedule. The 'Syor-Syor Yang Dicadangkan Bagi Bahagian-Bahagian Pilihan Raya Persekutuan dan Negeri Melaka Sebagaimana Yang Telah Dikaji Semula Oleh Suruhanjaya Pilihan Raya Dalam Tahun 2017' was made available to the public.

[12] The applicants argued in the High Court that non-compliance by the first respondent with ss 2(c) and 2(d) of the Thirteenth Schedule is a constitutional breach which will have the effect of nullifying the proposed recommendations. Furthermore, the first respondent's proposed recommendations are a decision, action or omission capable of being reviewed under O 53 of the Rules of Court 2012 ('the ROC').

[13] After hearing submissions of both parties the learned High Court judge held that the action of the first respondent is amenable to judicial review and granted leave as prayed. On 15 May 2017 the High Court granted an order that the review exercise including the local enquiries to be held pursuant to the second notice be stayed pending the judicial review.

[14] The attorney general, dissatisfied with the decision of the learned High Court judge, appealed to this court.

THE HIGH COURT'S DECISION

[15] The learned High Court judge's findings can be summarised as follows:

(a) the action of the first respondent is amenable to judicial review;

(b) the issues raised by the applicants are in respect of vital constitutional questions. Subsections 2(c) and (d) of the Thirteenth Schedule form part of the basic constitutional principles of a representative government. The first respondent is not competent to rule on any constitutional challenges or allegations of non-conformity with constitutional principles. Any constitutional challenges or allegations of non-conformity must be decided by the courts;

(c) even though the final decision on the delimitation is a matter for the House of Representatives, the courts have supervisory function of ensuring that there is procedural conformity;

(d) at the leave stage, the court need not consider the merits but need only be satisfied that the applicants have an arguable case; and

(e) the issue raised by the applicants is not the correctness of the electoral roll or a review of the rolls but as to how the EC could have done the

delimitation exercise in accordance with constitutional principles when they did not possess the addresses of those electors.

OUR DECISION

[16] The determinative issues in this appeal were as follows:

(a) whether the first respondent's proposed recommendation is subject to judicial review;

(b) whether the current electoral roll as required by s 3 of the Thirteenth Schedule was used in the review exercise;

(c) whether the electoral roll used in the review exercise can be questioned on the ground that 44,190 electors purportedly have no addresses corresponding to their names; and

(d) whether the second notice and the EC revised proposed recommendations for excluding the State of Selangor contravenes art 113(6) of the Federal Constitution.

Article 113 of the Federal Constitution

[17] Article 113(2)(i) of the Federal Constitution provides that the first respondent '... shall, from time to time, as they deem necessary, review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the Thirteenth Schedule; and the reviews of constituencies for the purpose of elections to the Legislative Assemblies shall be undertaken at the same time as the reviews of constituencies for the purpose of elections to the House of Representatives'.

[18] Article 113(3A) of the Federal Constitution requires the first respondent to conduct a review whenever art 46 of the Constitution is amended to alter the number of elected members of the House Representatives, or whenever a law enacted by the Legislature of a state alters the number of elected members of the Legislative Assembly of the State. The review must be completed within a period of not more than two years from the date of the coming into force of the law making alteration:

> (3A)(i) Where the number of elected members of the House of Representatives is altered in consequence of any amendment to Article 46, or the number of elected members of the Legislative Assembly of a State is altered in consequence of a law enacted by the Legislature of a State, the Election Commission shall, subject to Clause (3B), undertake a review of the division into federal or State constituencies, as the case may be, of the area which is affected by the alteration, and such review shall be completed within a period of not more than two years from the date of the coming into force of the law making the alteration.

A (ii) A review under paragraph (i) shall not affect the interval provided under paragraph (ii) of Clause (2) in respect of a review under paragraph (i) of that Clause.

(iii) The provisions of the Thirteenth Schedule shall apply to a review under this Clause, but subject to such modifications as may be considered necessary by the Election Commission.

B

[19] A review pursuant to cll (2) or (3A) of art 113 to the Federal Constitution shall be at the date of the publication in the *gazette* of the notice referred to in s 4 of the Thirteenth Schedule. Therefore, art 113(3A) to the Federal Constitution confers the obligation upon the first respondent to C conduct a review and to submit the report to the Prime Minister. A notice of such date shall be published by the first respondent in the *gazette*. Clauses (9)–(10) of art 113 provide as follows:

(9) The date of the commencement of a review under Clause (2) or Clause (3A), as D the case may be, shall be the date of the publication in the Gazette of the notice referred to in section 4 of the Thirteenth Schedule.

(10) The date of the completion of a review under Clause (2) or Clause (3A), as the case may be, shall be the date of the submission of the report to the Prime Minister under section 8 of the Thirteenth Schedule, and a notice of such date shall be E published by the Election Commission in the Gazette.

[20] The Thirteenth Schedule of the Federal Constitution sets out the principles and procedures which must be mandatorily complied with when F conducting such review exercise. Section 2 of Part I sets out the principles which shall be taken into account by the first respondent in dividing any unit of review into constituencies:

2 The following principles shall as far as possible be taken into account in dividing any unit of review into constituencies pursuant to the provisions of Articles 116 and G 117 —

(a) while having regard to the desirability of giving all electors reasonably convenient opportunities of going to the polls, constituencies ought to be delimited so that they do not cross State boundaries and regard ought to be had to the inconveniences of State constituencies crossing the H boundaries of federal constituencies;

(b) regard ought to be had to the administrative facilities available within the constituencies for the establishment of the necessary registration and polling machines;

I (c) the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies;

(d) regard ought to be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties.

3 For the purposes of this Part, the number of electors shall be taken to be as shown on the current electoral rolls.

3A For the purposes of this Part, in any review of constituencies for the purposes of election to the House of Representatives, the Federal Territory of Kuala Lumpur, the Federal Territory of Labuan and the Federal Territory of Putrajaya shall each be regarded as a State.

[21] Section 5, Part II of the Thirteenth Schedule provides that the first respondent will have to hold public enquiry to hear objections or concerns of the electors:

5 Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from —

(a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or

(b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,

the Commission shall cause a local enquiry to be held in respect of those constituencies.

[22] After completing the enquiry the first respondent will collate the representations and/or objections and prepare the revised proposed recommendations as required under s 7, Part II, of the Thirteenth Schedule. Section 7 provides as follow:

7 Where the Election Commission revise any proposed recommendations after publishing a notice thereof under section 4, the Commission shall comply again with that section in relation to the revised recommendations, as if no earlier notice had been published:

Provided that it shall not be necessary to hold more than two local enquiries in respect of any such recommendations.

[23] It is mandatory that the review exercise undertaken by the first respondent must be completed within the prescribed period of not more than two years from the date of its commencement:

(iii) A review under paragraph (i) shall be completed within a period of not more than two years from the date of its commencement.

(See: art 113(2)(iii) of the Federal Constitution).

[24] The main grounds of the applicants' appeal can be summarised as follows:

(a) whether the first respondent acted unconstitutionally by contravening and/or failing to apply art 113(2) of the Federal Constitution and the Thirteenth Schedule, in particular s 2(c) and (d) of the Thirteenth Schedule, in issuing the second notice and the proposed recommendations for the review in the State of Melaka, causing malapportionment and the breaking up of local ties;

(b) the first respondent failed to use the current electoral roll as postulated under s 3 of the Thirteenth Schedule;

(c) the first respondent acted contrary to law, unconstitutionally, unreasonably and/or irrationally when it conducted the 2016 delimitation exercise despite the fact that 44,190 voters in the State of Melaka do not have addresses; and

(d) the first respondent acted unconstitutionally by contravening and/or failing to apply art 113(6) of the Federal Constitution by issuing the second notice under s 7 of the Thirteenth Schedule which excluded the State of Selangor.

PRINCIPLES APPLICABLE TO AN APPLICATION FOR LEAVE

[25] It would be useful to state briefly the principles applicable for granting leave for judicial review. The test for granting leave have been discussed at length by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478. Suriyadi Halim Omar FCJ delivering the judgment of the court said at p 303 (MLJ); p 488 (CLJ), paras F–G:

> … leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be.

[26] Justice Asmabi Mohamad J (as she then was) in *Mkini Dotcom Sdn Bhd & Ors v Chief Judge of Malaya & Ors* [2016] 8 MLJ 357 at p 367; [2015] 9 CLJ 459 at p 466 said:

> It is settled law, the function of the court in exercising its power to grant leave for judicial review is to sieve through the application before it by examining the facts and the law and decide if the case is one which is frivolous and or one which merits further argument on the substantive motion. In exercising this function the court is guided by the principles laid down by the Court of Appeal in England in *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, as follows:

(i) if it is clear to the judge that there is a point for further investigation on a full inter parte basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(ii) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review; and

(iii) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(iv) in exercising the powers in an inter parte leave application the test applicable by the court must be the same approach as that as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further consideration or otherwise.

[27] Raus FCJ (as he then was) in the case of *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490; [2012] 1 CLJ 805 elucidated that firstly, there must be a decision by a decision making body and secondly, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review pursuant to O 53 of the Rules of Court 2012 ('the ROC'):

> [26] *It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. In England, in the case of Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.
>
> [27] We adopt the same view. Under the scheme of O 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review. In the present case, there is no dispute that the Commission is a public authority. But we are of the view that the Commission is not a decision making body. A closer look at the Commission's report will reveal that the Commission does not make legal decision. The report consists of findings and recommendations of the Commission on the five Terms of Reference entrusted upon them to do. Being mere findings and recommendations, it do not bind the respondents, not even the government.

[28] The main issue for determination in this appeal was whether the decision, acts or omission by the first respondent pursuant to art 113 of the Federal Constitution is reviewable under O 53 of the ROC. It would be

convenient to reproduce the relevant provisions of O 53 r 2 of the ROC:

> (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 109.
>
> (2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
>
> (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:
>
> Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950.
>
> (4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[29] In considering the issue before us we were guided by the principles mentioned above and cautioned ourselves that the delimitation exercise undertaken by the first respondent is conferred by the provisions of the supreme law of the land, the Federal Constitution. The provisions of the Federal Constitution are sacrosanct and must be respected and religiously adhered. The Court of Appeal in its majority judgment in *Yong Teck Lee v Harris Mohd Salleh & Ors* [2002] 3 MLJ 230; [2002] 3 CLJ 422 referred to the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 2 CLJ 1125; [1992] 1 CLJ Rep 72 where Abdul Hamid Omar LP explained at p 709 (MLJ); p 1130 (CLJ); pp 78–79 (CLJ Rep) of the report:

> Second, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v Fisher* at p 329, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.
>
> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relation McKinley v Commonwealth of Australia* at p 17:
>
> > the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

[30] Raja Azlan Shah LP in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Ahir bin Syed Idrus* [1981] 1 MLJ 29 (FC) said, at p 32 of the report:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other acts' (see *Minister of Home affairs v Fisher*). A constitution is suigeneris, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in Attorney-General of St Christopher, *Nevis and Anguilla v Reynolds*.

[31] In our approach to this appeal we have accordingly kept in the forefront of our minds the aforesaid principles.

[32] Learned senior federal counsel submitted that the first respondent's proposed recommendations do not fall within the ambit of an 'action' under O 53 r 2(4) of the ROC. He further submitted that 'action' refers to an act of doing something rather than a decision made. Furthermore, he argued the first respondent's proposed recommendations do not have any legal and binding effect. In support of his contention he referred to the Federal Court case of *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490 where it was held that the Commission is not a decision making body. The report by the Commission were mere findings and recommendations, and as such does not bind the parties.

[33] In reply learned counsel for the applicants submitted that the proposed recommendations of the first respondent are in fact decisions as the first respondent is a decision making body. Therefore, she argued that the applicants were adversely affected by the proposed recommendation of the first respondent. The proposals and recommendations even if subject to confirmation by another body can be reviewed by the courts to ensure that the first respondent comply with the constitutional requirements. Accordingly,

learned counsel submitted that the learned High Court judge was correct in allowing the application for leave for judicial review.

[34] In judicial review, the court is only to intervene where there is illegality, procedural impropriety or irrationality and possibly proportionality. The decision, action and/or omission of the public body must have the effect of altering the rights or obligations of the applicants and deprive them of some benefit or advantage. Therefore, the courts in a judicial review must scrutinise the reasoning of a decision and/or action and subsequently to decide if the decision is tainted with 'illegality', 'irrationality' and 'procedural impropriety' to merit curial intervention by the court.

[35] Lord Diplock in the landmark decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (GCHQ case) said, at p 409, for a decision made by a public entity to be amenable for judicial review:

> ... the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute: but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself ...

[36] Suriyadi Halim Omar FCJ through his grounds of judgment in *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812; [2014] 9 CLJ 577 explained with clarity the meaning of justiciability:

> Justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. If the court has no authority to adjudicate over the dispute, then it is non-justiciable.

[37] The court would commonly refuse to grant leave in cases where the matters are non-justiciable. Gopal Sri Ram JCA (as he then was) in the case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 67; [2006] 1 CLJ 927 at p 929, had the occasion to state:

> Applications for leave under O 53 are made — and they must be made — through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave it is a case where the subject matter of

the review is one which by settled law (either written law or the common law) is non-justiciable, eg proceedings in Parliament (paras 5 & 10).

[38] In his grounds of judgment the learned High Court judge stated that the matters raised by the applicants are of great public interest and importance and the court should not abdicate from its duty to exercise its supervisory jurisdiction to ensure procedural conformity with constitutional principles embodied in the Federal Constitution. His Lordship was of the considered view that the applicants had made out an arguable case, the merits of which ought to be heard at a hearing of the substantive application.

[39] However, not all the decisions or actions by a public body such as the first respondent are suitable for curial scrutiny. The Court of Appeal in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi* [2015] MLJU 2268; [2015] 3 AMR 35 posed the question as follows:

> If the applicant can prima facie satisfy that he is a person affected by a decision of a quasi-judicial or administrative nature or made by a public body, the simple question that the court should ask is only this — Why should leave not be granted?

[40] We asked ourselves why should leave not be granted in this case. In carrying out the review exercise pursuant to the provisions of the Federal Constitution by the first respondent cannot act capriciously as it has a constitutional obligation to adhere to the principles and procedures as prescribed in the Thirteenth Schedule. Under the Thirteenth Schedule the recommendation by the first respondent must be open to inspection if it receives any representation objecting to the proposed recommendations from the State Government or any local authority affected by the recommendation; or a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question. The first respondent shall then cause a local enquiry to be held in respect of those constituencies. Under this provision of the Constitution those who have any objection in respect of the proposed recommendations may submit their objections at the enquiry (see s 5 of the Thirteenth Schedule):

> 5 Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from —
>
> (a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or
>
> (b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,
>
> the Commission shall cause a local enquiry to be held in respect of those constituencies.

[41] The first respondent can hold two local enquiries in respect of any such recommendations (see s 7 of the Thirteenth Schedule):

> 7 Where the Election Commission revise any proposed recommendations after publishing a notice thereof under section 4, the Commission shall comply again with that section in relation to the revised recommendations, as if no earlier notice had been published:
>
> Provided that it shall not be necessary to hold more than two local enquiries in respect of any such recommendations.

[42] It is a mandatory requirement under the Federal Constitution to hold the enquiry to hear objections, if any, and to propose recommendations. The first respondent collates the views and objections raised by the persons concerned. The first respondent does not decide but instead its constitutional duty is to formulate provisional recommendations in accordance with the principles as set out in Part I of the Thirteenth Schedule.

[43] After collating the views and objections, the first respondent will prepare a report and submit the said report to the Prime Minister as prescribed under s 8. The Prime Minister shall then lay the report before the House of Representatives, together with the draft of an order to be made under s 12 for giving effect, with or without modifications, to the recommendations contained in the report:

> 8 The Election Commission shall, having completed the procedure prescribed by this Part, submit to the Prime Minister a report on constituencies showing —
>
> (a) the constituencies into which they recommend that each unit of review should be divided in order to give effect to the principles set out in section 2; and
>
> (b) the names by which they recommend that those constituencies shall be known,
>
> or stating that in their opinion no alteration is required to be made in order to give effect to the said principles.
>
> 9 As soon as may be after the Election Commission have submitted their report to the Prime Minister under section 8, he shall lay the report before the House of Representatives, together (except in a case where the report states that no alteration is required to be made) with the draft of an Order to be made under section 12 for giving effect, with or without modifications, to the recommendations contained in the report.

[44] The penultimate decision maker in this delimitation exercise is the House of Representatives. The Federal Constitution confers on the House of Representatives the constitutional duty either to approve or reject the proposed recommendations (see ss 10 and 11 of the Thirteenth Schedule):

10 If any draft Order referred to in section 9 is approved by the House of Representatives by resolution supported by the votes of not less than one-half of the total number of members of that House, the Prime Minister shall submit the draft Order to the Yang di-Pertuan Agong.

11 If a motion for the approval of any draft Order referred to in section 9 is rejected by the House of Representatives, or is withdrawn by leave of the House, or is not supported by the votes of not less than one-half of the total number of members of the House, the Prime Minister may, after such consultation with the Election Commission as he may consider necessary, amend the draft and lay the amended draft before the House of Representatives; and if the draft as so amended is approved by the House by a resolution supported by the votes of not less than one-half of the total number of members of the House, the Prime Minister shall submit the amended draft to the Yang di-Pertuan Agong.

[45] As submitted by the learned Senior Federal Counsel, the decision of the House of Representatives is constitutionally protected by virtue of art 63(1) of the Federal Constitution which reads:

The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court.

[46] A judicial review by the courts in matters pertaining to the delimitation exercise would be an encroachment of a function constitutionally mandated by the Federal Constitution. The delimitation exercise is a process which will be ultimately decided by the House of Representatives. This court in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367 explained the rationale of the review and the enquiry:

[57] Having regard to the legislative scheme of Part II of the Thirteenth Schedule, it is clear that the purpose behind the requirement to publish the notice under s 4(a) is merely to kick start the process of public consultation between the EC and the registered voters. The process does not end with the publication of the notice. It is only the beginning of the process. The consultation process itself will take place at the enquiry held under s 5(b) of the Thirteenth Schedule. This is the proper forum to trash out any objections to the proposed recommendations, and not the court ...

[63] It is not hard to understand why it is made mandatory for the EC to hold an enquiry under s 5(a) upon receiving any representation of objection to the proposed recommendations. It is to give the voters, who have a stake in the election process, to argue for a revision of the proposed recommendations or even to drop any of the recommendations before they are passed into law by the House of Representatives.

[47] Thus, it is clear that art 113 to the Federal Constitution has entrusted it upon the first respondent to undertake the delimitation process within the framework of the said article. The first respondent's findings and proposed recommendations are not binding or have any legal effect as the proper authority for deciding on the delimitation of constituencies is the House of

A Representatives. Therefore, applying the above principle to the facts of the present case, we held that the findings and recommendations of the first respondent did not come within the ambit of O 53 of the ROC and that the learned High Court judge had gravely erred in granting leave.

B *Whether the current electoral roll as required by s 3 of the Thirteenth Schedule was used in the review exercise*

[48] The applicants contended that the first respondent used a flawed electoral roll and not the current electoral roll in the 2016 delimitation exercise, and as such the exercise was unconstitutionally conducted. Learned counsel for the applicants submitted that the notice of the supplementary electoral roll for the first quarter of 2016 was published in the *gazette* on *19 July 2016* and therefore, the current electoral roll. It was further argued that the certified 2015 principal electoral roll published in the *gazette* on *13 May 2016* and used in the delimitation exercise was not the current electoral roll.

[49] Learned senior federal counsel, however, submitted that there was no contravention of s 3 of the Thirteenth Schedule as the first respondent had correctly used the current electoral roll as required by that section. When the review exercise commenced the current electoral roll was the electoral roll published in the *gazette* on 13 May 2016.

[50] The learned High Court judge, however, was satisfied that the applicants have an arguable case. The court, His Lordship said, will have to determine whether the current electoral roll means the electoral roll in force at the time the review exercise commenced or the electoral roll in force at the date when the first respondent published the first notice under s 4 under the Thirteenth Schedule.

[51] Section 3 of the Thirteenth Schedule reads:

> For the purposes of this Part, the number of electors shall be taken to be as shown on the current electoral rolls.

[52] Section 4 of the Thirteenth Schedule falls under Part II of the same Schedule which sets out the procedure for delimitation of constituencies. Under this section the first respondent is required to publish in the *gazette* and in at least one newspaper circulating in the constituency a notice stating:

> (a) the effect of their proposed recommendations, and (except in a case where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency; and

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the publication of such notice, ...

[53] On 14 July 2016, when the delimitation exercise was commenced, the current electoral roll would be the 2015 principal electoral roll as it was published in the *gazette* on 13 May 2016. The first notice was published on 15 September 2016. The supplementary electoral roll for the first quarter of 2016 was published in the *gazette* on 19 July 2016 after the first notice. Based on the reasons mentioned above we were of the considered opinion that no arguable case had been made out by the applicants for the matter to be further investigated at the substantive stage.

Whether the electoral roll used in the review exercise can be questioned on the ground that 44,190 electors have no addresses corresponding to their names

[54] Learned counsel for the applicants argued in submission that the first respondent did not possess the correct data when assigning voters to the appropriate polling districts or maintaining the voters in the respective polling districts when conducting the delimitation exercise.

[55] We were of the considered view that in determining this issue we could not ignore s 9A of the Elections Act 1958 which reads:

After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or recertification has been published in the Gazette as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.

[56] The Federal Court, in *Muhammad Sanusi bin Md Nor v Mohd Tajuddin bin Abdullah & Ors* [2008] MLJU 570; [2009] 1 CLJ 1, held once the electoral roll has been certified or re-certified, as the case may be and published in the *gazette*, the electoral roll shall be deemed to be final and binding and cannot be questioned in any court:

[15] Pada hemat kami adalah jelas dari peruntukan di atas bahawa hak untuk menimbulkan apa-apa isu atau bantahan terhadap daftar pemilih perlu dilaksanakan sebelum ianya diperakui atau diperakui semula dan sebelum notis perakuan tersebut diwartakan ...

[21] Jelas bagi kami bahawa daftar pemilih adalah muktamad dan tidak boleh dipertikaikan di dalam mana-mana mahkamah. Begitulah maksud dan hasrat s 9A APR 1958 yang telah dihuraikan di atas.

[57] The first respondent in this delimitation exercise had used the electoral roll which has been certified and *gazetted*. The law is explicit that once the

A electoral roll has been certified and *gazetted* it shall be deemed final and cannot be questioned by any court.

Whether the second notice and the EC revised proposed recommendations for excluding the State of Selangor contravenes art 113(6) of the Federal Constitution

B

[58] The applicants submitted that the State of Selangor which was included in the first notice was excluded in the second notice because of the stay order granted by the Kula Lumpur High Court. Therefore, it was argued that the second stage of the delimitation exercise under the second notice proceeded C without one of the States of Malaya. It is therefore unconstitutional for the State of Selangor to be left out of the second stage of the delimitation exercise pursuant to s 7 of the Thirteenth Schedule.

D **[59]** The learned High Court judge held that there are arguable points on the interpretation of the words 'unit of review' in art 113(6) and whether under s 4 of the Thirteenth Schedule there can be multiple notices for one or several States of Malaya.

E **[60]** Article 113(6) to the Federal Constitution provides as follows:

> There shall be separate reviews under Clause (2) for the States of Malaya and for each of the States of Sabah and Sarawak, and for the purposes of this Part the expression 'unit of review' shall mean, for federal constituencies, the area under review and, for State constituencies, the State and the expression 'States of Malaya' shall include the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

F

[61] Article 113(6) to the Federal Constitution envisages that the delimitation exercise must be undertaken as a single unit of review. It is expressly defined that 'unit of review' shall mean, for federal constituencies, the G area under review and, for state constituencies, the state. In this case, the first respondent had proceeded to carry out its constitutional function and issued the second notice for all affected constituencies except for the State of Selangor which could not be included because of the stay order granted by the High Court.

H

[62] The first respondent should not be hampered in any manner to carry out its constitutional function because of the intervening act to stay the exercise in the State of Selangor. The first respondent is constitutionally bound to proceed with all the local enquiries in order to discharge its constitutional duty.

I

CONCLUSION

[63] For all the reasons aforesaid we were unanimous in finding that there were sufficient merits in this appeal to justify our intervention of the decision

of the High Court. We allowed the appeal with no order as to costs. We set aside the order of the learned High Court judge.

Appeal allowed with no order as to costs; High Court order set aside.

Reported by Afiq Mohamad Noor